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Supreme Court of the United States

OCTOBER TERM, 1923.

No. 221.

COMMISSIONER OF IMMIGRATION OF PORT OF NEW YORK,

Petitioner,

against

GITTEL GOTTLIEB and ISRAEL GOTTLIEB.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENTS' SUPPLEMENTAL BRIEF.

LOUIS MARSHALL,
JOSEPH G. M. BROWNE,
BARNET E. KOPELMAN,
MAX J. KOHLER,
of Counsel.

PRESS OF FREMONT PAYNE, INC., 80 Washington St., New York City.

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RESPONDENTS' SUPPLEMENTAL BRIEF.

The importance of the questions presented by the record in this case and the conceded hardship of a decision adverse to the respondents, are our justification for presenting additional considerations in support of the conclusions reached in the District Court and in the Circuit Court of Appeals. Every effort will be made to avoid repetition, although it may be necessary, incidentally, to refer to some of the authorities cited in the main brief.

POINTS.

I.

Giving due consideration to our past policy, to the provisions of our basic Immigration Act of 1917 and to the Quota Law of 1921, a clear purpose is manifest to avoid the separation of their wives and children from those husbands and fathers belonging to the classes enumerated in the second proviso of Section 2 (d) of the Quota Law, including "ministers of any religious denomination" who enter the United States. Such wives and children are, therefore, admissible as immigrants regardless of quota restrictions.

There can be no doubt that Congress intended to afford an exceptional privilege to those enumerated in the proviso. They were apparently looked upon as especially desirable immigrants. They include professional actors, artists, lecturers, singers, ministers of religious denominations, professors for colleges or seminaries, and aliens belonging to a recognized learned profession. Naturally they were regarded as likely to make valuable contributions to the moral, intellectual and artistic life of our country. It could not have been intended, when our doors were opened to them, that they would be subjected to the mental anguish and to the suffering attendant upon separation from their wives and children. Nor could it have been purposed that these wives and children should be left behind and isolated. The breaking up of the families of these

persons, leaving the husbands to pursue their vocations in the United States and the wives and children to languish in other lands and to depend for their protection upon strangers, could never have been contemplated by Congress when it conferred upon these selected persons the right to enter.

In the Brief of the Government, page 4, it is said:

> "We venture the opinion that there should be such elasticity in the practical administration of the law as would permit the Commissioner of Immigration to make an exception in isolated cases, *where the enforcement of the law requires the separation of a family, a result which seems to us abhorrent.*"

It is safe to say that such a result as that which the Petitioner is seeking to accomplish in the present case must have been just as abhorrent to the members of the Congress which enacted this proviso as it is to the learned counsel who are arguing for such a result. The welfare of the state is promoted by preserving the unity of the family. The well-being of the individual is preserved when he is free to pursue his activities without undergoing the suffering consequent upon a separation from his wife and children, and from anxiety for their security occasioned by such separation.

In the report rendered to Congress on December 5, 1910, by the Immigration Commission, of which Senator Dillingham, the father of the Quota Law, was the Chairman (Vol. I, page 42), the importance of preserving family life was emphasized, and the preferability of married immigrants to those who were unmarried, was dwelt upon.

In 1913, Dr. Charles W. Elliott submitted a report to the Carnegie Endowment for International

Peace, entitled *"Some Roads Towards Peace."* That far-sighted philosopher said:

> "The desirable immigrant is the healthy, strong man who comes to the new land with wife and children, meaning to settle there for good. All laws against contract labor impede family immigration, because a prudent head of a family wants to know before he starts from home where he is to earn his family's livelihood in the new land."

This merely expresses a truth recognized by every normal mind. That it has been interwoven into our immigration legislation will appear by reference to statutes, treaties and conventions in *pari materia,* and to decisions interpreting them.

(1) The Chinese Exclusion Act of July 5, 1884, read in conjunction with the Treaty with China of November 17, 1880, affords a striking illustration.

The statute required Chinese, other than laborers, to be identified by certificates issued by the Chinese Government. Chinese subjects who were merchants were, under the Treaty, accorded the right to go and to come of their own free will and accord. The wives and children of merchants were not mentioned, either in the Exclusion Act or in the Treaty. Yet it was held that they were entitled to come to the United States without the certificate and to be admitted, because the companionship of the wife and of the children of a Chinese merchant were his by natural right and that he should not be deprived of either unless Congress in clear and unmistakable terms so provided.

United States vs. *Mrs. Gue Lim,* 176 U. S., 459;

In re Chun Teoy Hoy, 42 Fed. Rep., 398, 399, 402.

In other words, where an exception was made in favor of a merchant as a member of a privileged class, his wife and children were intended to come within the same privilege even though they were not specified as members of the class.

(2) This rule was applied to the adopted children of Chinese non-laborers.

Ex parte Fong Yim, 134 Fed. Rep., 938; approved in
United States vs. *Tod,* 290 Fed. Rep., 689;
United States vs. *Lee Chee,* 224 Fed. Rep., 447.

In the first of these cases the Court regarded the subject as involving not only the right of wife and child to enter, but of husband and father to have them join him.

(3) Under the Gentlemen's Agreement with Japan it was provided that a husband domiciled in the United States might send for his wife. Under that agreement it was held that, even though the wife was a laborer and would not have been entitled to a passport had she sought admission with the avowed intention of assuming a status independent of her husband, she was, nevertheless, entitled to enter.

Ex parte Hasaye Sakaguchi, 277 Fed. Rep., 913, 915.
H. R. Report (67th Congress, 4th Session), No. 1621, pages 19-23.

(4) Under the so-called literacy test contained in Section 3 of the Immigration Act of 1917 all aliens over sixteen years of age, physically capable of reading, who could not read the English language or some other language or dialect, including Hebrew or Yiddish, were excluded from admission. It was, however, provided that any alien theretofore or thereafter admitted "may bring in or send for * * * his wife * * * whether such relative can read or not, and such relative shall be permitted to enter."

(5) Section 3 of the Act of 1917 likewise contains the provision which the Circuit Court of Appeals in this case held generally applicable, but which the Government contends relates merely to those coming from the Asiatic barred zone. By that clause an exception is made in favor of Government officers, ministers or religious teachers, missionaries, lawyers, physicians, chemists, civil engineers, teachers, students, authors, artists, merchants, and travelers for curiosity or pleasure, and "their legal wives or their children under sixteen years of age who shall accompany them or who subsequently may apply for admission to the United States."

If this clause is to receive the interpretation given to it by the Circuit Court of Appeals, then it would apply to the wives and children of the similarly privileged classes of immigrants enumerated in the second proviso of Section 2, subdivision (d), of the Quota Law, inasmuch as the provisions of that law are declared by Section 4 to be "in addition to and not in substitution for the provisions of the immigration laws."

If that clause, however, relates solely to the enumerated classes who shall come from the Asiatic barred zone, then it is difficult to understand why the wives and children of persons of the designated classes, as, for example, ministers or religious teachers, shall be admitted as of right, while the wives and children of ministers of any religious denomination, specified in the second proviso of Section 2d of the Quota Law, shall not be admitted after the exhaustion of the quota of the nationality to which they belong. It is scarcely conceivable that the wives or children of a minister or of a teacher or artist from Afghanistan or Siam should be admitted, while the wife or the children of a person of similar occupation from England, Italy or Palestine should be excluded after the quotas of the countries named had been exceeded. Nobody would venture the assertion that the former are more desirable than the latter or are subject to more acute suffering, or are endowed with more profound emotions or are possessed of greater social needs.

(6) This is an especially significant inquiry when one considers the fact that, by Section 2 (a) of the Quota Law, it is provided that that Act is not to apply at all to eight enumerated categories, the sixth being *"aliens from the so-called Asiatic barred zone, as described in Section three of the Immigration Act."*

If the aliens referred to, who are "not to be counted in reckoning any of the percentage limits provided in this act" (the Quota Law), are to include the persons having the status or occupations named in the proviso contained in Section 3 of the

Act of 1917, which immediately follows the clause relating to the Asiatic barred zone, that would necessarily admit the legal wives or children under sixteen years of age of the designated persons coming from that barred zone.

Having thus, in the Quota Law itself, declared that the wives and children under sixteen years of age of ministers or religious teachers coming from the Asiatic barred zone shall be admitted, it would be ludicrous to attribute to Congress any different intention with respect to the wives and children of ministers of religious denominations coming from countries outside of the barred zone.

The injustice resulting from such irregularity should be avoided.

Lionberger vs. *Rouse,* 9 Wall., 476.

See also

Harless vs. *United States,* 88 Fed. Rep., 97, 102.

The words of Mr. Justice Johnson in *United States* vs. *Heth,* 3 Cranch., 409, are impressive:

> "* * * Where it can be shown, that a government has once adopted a certain rule of justice for its conduct, it is fair to infer that, in legislating afterwards upon the same subject, it intended to pursue the same rule, unless the contrary shall be clearly expressed."

Mr. Justice Washington said (page 411):

> "The change of expression in the latter law, I take to be perfectly accidental."

(7) As further indicative of a solicitous purpose to provide for the wives and children of immigrants, weight should be given to the last proviso of Section 2 (d) of the Quota Law, which, *dealing with* the general mass of immigrants who do not belong to any of the privileged classes previously enumerated, provides "that in the enforcement of this Act preference shall be given so far as possible to the *wives* * * * *children* under eighteen years of age and fiancees * * * of aliens now in the United States who have applied for citizenship in the manner provided by law."

(8) Returning to the Immigration Act of 1917, attention is now directed to Section 22, as indicative of a tender consideration for immigrants and their wives and children. It provides:

> "That whenever an alien shall have been naturalized *or shall have taken up his permanent residence in this country, and thereafter shall send for his wife or minor children to join him,* and said wife or any of said minor children shall be found to be affected with any contagious disorder, such wife or minor children shall be held, under such regulations as the Secretary of Labor shall prescribe, until it shall be determined whether the disorder will be easily curable or whether they can be permitted to land without danger to other persons; and they shall not be either admitted or deported until such facts have been ascertained; and if it shall be determined that the disorder is easily curable and the husband or father or other responsible person is willing to bear the expense of the treatment, they may be accorded treatment in hospital until cured and then be admitted, or if it shall be determined that they can be permitted to land with-

out danger to other persons, they may, if otherwise admissible, thereupon be admitted."

See

32 *Opinions of Attorney-General*, 209.

(9) As indicative of the same idea as to the non-separation of husbands from their wives and children, we direct attention to a number of foreign treaties and conventions bearing on the subject.

Thus from a recent compilation prepared by a Commission on Immigration appointed by the International Labor Office, entitled *"Emigration and Immigration, Legislation and Treaties,"* Geneva, 1922, we excerpt the following passages:

> "In the course of recent years, international agreements concerning emigration have developed to such an extent that it is no longer possible to neglect them; laws and treaties now form an indivisible whole" (page xi).
>
> "In practice, these provisions (seven preceding classes of regulations concerning immigration) are not always applied in a very rigid manner, and there are in most laws clauses which permit of exceptions being made, The application is much more important than the text itself. * * * *Many exceptional clauses facilitate the reunion of families. Wives, minor children,* old parents or other members of the family *or friends specified by the immigrants, are received either by way of exception* to the ordinary law, or under special conditions" (pages 218-19).

Examples in point from which this general statement is deduced are specified. For example, the term "immigrant" is expressly defined to include

wife and child in the following among other countries, according to the definitions reprinted (pages 155-159): Austria (page 156); Canada (page 157), as to officers and men connected with his Majesty's regular naval and military forces; Mexico (page 158). So, also, the term "emigrant" is in various countries expressly defined to include the families of such person (page 2 *et seq.*): Czechoslovakia (page 2); Finland (page 3); Poland (page 7).

In several recent special immigration treaties between different countries the family's right to accompany the immigrant is expressly provided for (see pages 342-344 for Franco-Italian Treaty of 1919, etc.). The Belgian treaties for repatriation with Germany, Italy and Switzerland of 1887, 1890 and 1896 in terms provide (page 393):

> "In the case of repatriation, wives shall not be separated from their husbands nor children from their parents, except in the case of persons treated or maintained by means of public funds."

The treaty of 1910 between Switzerland and Germany (page 361) to the same effect, is typical, and the general conclusion is expressed (page 361):

> "The country of origin undertakes to receive its nationals at any time, provided that they have preserved their rights of nationality. *This obligation usually includes the family of the person expelled.*"

See also, opinion of Judge Deady, in *Chun Teoy Hoy*, 42 Fed. Rep., 398, 399.

(10) Section 2 (a) of the Quota Law also enumerates as a class of immigrants who are not to be counted in reckoning any of the percentage limits provided in the Act:

> "8. Aliens under the age of eighteen years who are *children* of citizens of the United States."

In this connection we may be permitted to call attention to the fact, as illustrative of the inaccuracies and inconsistencies to be found in the Act, that in the last proviso of Section 2, subdivision (d), children under eighteen years of age of citizens of the United States and of alien declarants are among those to whom preference merely is given in the enforcement of the Act. Is it, therefore, especially significant that, in the previous proviso of the same section, no reference is made to the wives or children of the privileged classes, which include "ministers of any religious denomination"? Hasty draftsmanship is a sufficient explanation.

> "In this country, where statute law is the hurried work of over-busy individuals, very little importance can be attached to accidents of phraseology."
>
> *Upton* vs. *U. S.*, 19 Ct. Cl., 49.

(11) The fact that, in the second proviso of Section 2 (d) of the Quota Law, "aliens employed as domestic servants" are to be admitted, just as are ministers of any religious denomination and other professionals, even though the maximum number of aliens of the same nationality shall have entered the United States, naturally gives rise to the inference that Congress must have intended that the wives and minor children of such professionals were also admissible. There is an infinitely stronger

reason, based on public policy and the dictates of humanity, for admitting wives and children than for admitting domestic servants. It would be the very irony of fate, or rather the height of absurdity if a minister of religion coming to this country with his wife, his child and a domestic servant, were admitted with the servant, while his wife and child would be excluded because the quota limits had been reached. That was one of the considerations which impressed this Court in *United States* vs. *Mrs. Gue Lim, supra.* The words "together with their body and household servants," contained in the Treaty with China there under consideration, led to the conclusion that, although the wives and children of merchants were not mentioned, it must have been intended to include them, by necessary implication, in the Treaty.

In the course of the Government's Brief various arguments are adduced which we regard as fallacious and will now briefly consider:

(a) The Government's argument is based largely on the absence from the second proviso of Section 2 (d) of the Quota Law of a reference to the wives and children of the persons therein mentioned. This is merely an effort to apply the *expressio unius* rule to this statute. In view of the decisions in *United States* vs. *Mrs. Gue Lim, supra, Church of the Holy Trinity* vs. *United States,* 143 U. S., 457, *Lau Ow Bew* vs. *United States,* 144 U. S., 47, and *United States* vs. *Laws,* 163 U. S., 258, 265, there is no potency in its application here.

(*b*) The petitioner's brief, in attempting to minimize the argument that the wives and children of the persons enumerated in the second proviso of Section 2(d) are to be deemed included in its terms, calls attention to the fact that among the

classes specified are "nurses" and "aliens employed as domestic servants." From this it is contended that if the husbands, wives or children of "nurses" and "domestic servants" were to be regarded *ipso facto* as admissible immigrants, it would tend to increase the quota limits indefinitely.

The argument proceeds on an erroneous interpretation of the words referred to. These two classes are to be found among those specified in the fourth proviso of Section 3 of the Immigration Act of 1917, which relates to contract labor and which declares the contract labor clause inapplicable to "professional actors, artists, lecturers, singers, *nurses*, ministers of any religious denomination, professors for colleges or seminaries, persons belonging to any recognized learned profession, or *persons employed as domestic servants.*" These are the identical classes mentioned in Section 2(d) of the Quota Law of 1921, here under consideration.

Reference to the Immigration Rules which were adopted on May 1, 1917, and which were in force at the time of the enactment of the Quota Law, enables one to appreciate what must have been understood by Congress as covered by these two categories at the time of such enactment.

Rule 27, Subdivision 2, on the subject of alien contract laborers, reads as follows:

> "Subd. 2. *Exemptions.* Aliens falling within the foregoing definition may be admitted to the United States, however, upon presenting satisfactory evidence that they are:
>
> (*a*) Professional actors;
> (*b*) Professional artists;
> (*c*) Professional lecturers;
> (*d*) Professional singers;
> (*e*) *Professional nurses* (*i.e., trained nurses holding diplomas from recognized nurses' training schools or hospitals*);

(*f*) Ministers of any religious denomination;

(*g*) Professors for colleges or seminaries;

(*h*) Persons belonging to any recognized learned profession;

(*i*) *Persons employed as domestic servants (i.e., employed in household affairs, as distinguished from work not immediately connected with the conduct of a family establishment, and as distinguished from personal service such as that rendered by valets and ladies' maids);*"

This demonstrates how unfounded is the fear that our interpretation of the statute would appreciably increase the number of immigrants. It would not precipitate a flood of immigration.

This is made even more certain by the Immigration Regulations approved by the Secretary of Labor and adopted under the Quota Law, as shown by the Seventh Edition of the Rules, page 97, promulgated in August, 1922, by which it is provided under Subdivision (b) of Rule 2:

> "*Aliens employed as domestic servants.* Domestic servants, for the purposes of the Act, are those only *who have actually been employed, either in the United States or any foreign country, in the household of the person or persons accompanying them or to whom destined in the United States, coming for the purpose of continuing such employment.*"

(*c*) Nor is there any virtue in the contention that it is the husband coming to this country, who is responsible for the separation which has occurred in his family, and that it is not the operation of our laws but his own act which has created the hardship of which complaint is made.

We are merely dealing with a class of immigrants who, by express provision of the statute, are

permitted to enter regardless of the Quota Law. As to them, we contend that the right granted implied immunity from enforced separation of the admissible class of immigrants from their families. The fact that these immigrants were given the unconditional right to enter the United States, indicates that Congress in conferring such privilege considered itself as giving expression to a sound principle of public policy and as believing that the admission of the enumerated classes promoted the public welfare. Otherwise they would not have been singled out for special consideration. That negatives the idea that it could have been contemplated that the persons thus virtually invited to come, were to be deprived of the companionship of their wives and children and were to be charged with what is the equivalent of their wilful abandonment, if they were not admitted by reason of the rigorous application of the Quota Law.

In the present case, Rabbi Gottlieb arrived here in 1920, before it was supposed that the quota principle would be incorporated into our law. He could not have anticipated that his wife and child would be debarred from entering for any such reason as that was urged by the petitioner. On May 10, 1921, he made a declaration of intention to become a citizen of the United States (*Rec., fol.* 51). From the time of his arrival he contributed to the support of his wife and child out of his earnings. He entered into a contract with a religious corporation to preach for it during a term of three years (*Rec., fols.* 48-51). He sent money to his family to bring them to the United States, and on May 19, 1921, a passport was issued to them by the Government of Palestine, and was visaed by the American Consul at Jerusalem on May 23, 1921. They departed from Jeru-

salem eight days after the passport was visaed, proceeded to Alexandria, whence they sailed to Marseilles and were detained for six months in France in an effort to secure transportation, although they had been supplied with steamship tickets (*Rec., fols.* 43-46). The Quota Law was not enacted until May 19, 1921.

To say, under these circumstances, that Rabbi Gottlieb has been responsible for the effort made by the Commissioner of Immigration during the past two years to deprive him of his family, merely adds the poignancy of injustice to the bitterness of his suffering.

(*d*) Nor is it a sound argument to assert that the exclusion of the respondents because the quota for 1921 had been exceeded at the time of their arrival, would not prevent their making an effort to enter during the next fiscal year or some year thereafter, and that the exclusion was not a permanent one.

In view of the fact that the total quota for Palestine is approximately 50 and that that quota might be exceeded in any year, or for that matter, in any month, while the respondents were on their way to the United States from a foreign port, it would afford them but little solace to be informed that they might try again in another year. In the meantime there are pending before Congress a number of bills by which it is sought to reduce the quotas; and there are even those who are advocating a total prohibition of immigration, and are thus adding to the difficulties encountered by those who are yearning for a reunited family group. It is not believable that Congress had it in mind to confer upon the families of the privileged immigrants such tender mercies as those dangled before their hungry hearts by the petitioner.

(*e*) The decisions principally relied upon by the petitioner are inapplicable here.

Zartarian vs. *Billings*, 204 U. S., 170, merely held that a child of a naturalized citizen of the United States who was born abroad prior to such naturalization, arriving here, but not permitted to land because she was afflicted with a dangerous contagious disease, was not entitled to admission because of the prohibition contained in the Immigration Act. That seemed to involve a brief separation only, of parent and child.

It was likewise decided that she was not to be regarded as a citizen of the United States because of the express limitation contained in Section 2172 of the United States Revised Statutes, that it was only children of a naturalized citizen "themselves dwelling in the United States" who became citizens as a result of their father's naturalization.

By Section 22 of the Immigration Act of 1917 such diseased children may now enter temporarily under certain conditions.

Low Wah Suey vs. *Backus*, 225 U. S., 460, was the case of a Chinese woman who could not be naturalized and who came to the United States after her marriage in China to a citizen of the United States. She acquired no status as a citizen because so married by reason of the limitations contained in Section 1994 of the United States Revised Statutes. It was found that, after her arrival here, she had violated the privilege of the Immigration Act by being in a house of prostitution. It was held that her marriage did not afford her immunity; and the case was distinguished from *United States* vs. *Mrs. Gue Lim* (*supra*) on obvious grounds, which are equally applicable here.

Yee Won vs. *White,* 256 U. S., 399, 402, was the case of the wife and minor children of a Chinese person who had been originally admitted to the United States as the son of one who at the time of entry was a merchant. He was therefore admissible under the decision in *United States* vs. *Mrs. Gue Lim* (*supra*). He subsequently changed his status and became a laborer, and then returned to China, where he married and had two children. He then returned to the United States with his wife and minor children. It was held that his change of status brought them outside of the scope of the decision in the case cited.

II.

The Quota Law does not authorize deportation because at the time when the immigrant arrives the quota assigned to his nationality has been exceeded.

The Quota Law is silent as to the consequences resulting from the existence of an excess of immigrants over the maximum number assigned to their respective countries. It does not purport to amend the Immigration Laws. It is merely an addition to and not in any way a substitute for them. It does not make the administrative provision of the Immigration Act applicable to the excess quota cases.

United States vs. *Woo Jan,* 245 U. S., 552.

Section 18 of the Immigration Act of 1917 contains a provision for deportation "unless in the opinion of the Secretary of Labor immediate deportation is not practicable or proper." Section 19 contains provisions for deportation in various contingencies which have no application here. Sec-

tion 21 provides for the giving of a bond in certain other cases in order to stay deportation.

Even if Section 18 of the Act of 1917 were to apply to cases of quota excesses, it would only be subject to the qualification just referred to, "unless in the opinion of the Secretary of Labor immediate deportation is not practicable or proper."

It would also be subject to the condition contained in the eighth proviso of Section 3 of the Act of 1917:

> "Provided further, that the Commissioner General of Immigration, with the approval of the Secretary of Labor, shall issue rules and prescribe conditions, including exaction of such bonds as may be necessary, to control and regulate the admission and return of otherwise inadmissible aliens applying for temporary admission."

The right of the Secretary of Labor with judicial approval to bond immigrants, even in the absence of an express statute, has long been exercised as an inherent power possessed by him.

A fact even more significant is that Section 9 of the Act of 1917, which penalizes steamship companies for bringing aliens to the United States whom they should have known to be inadmissible, was not extended to cover excess quota cases by any provision contained in the Quota Law of 1921. A provision relating to the subject was, however, enacted by the Act of May 11, 1922, long after the decision by the District Court in this case. How could the immigrants possessed of passports duly vised by Consuls of the United States, know whether or not at the time of their embarkation the quotas assigned to their countries had been exhausted or were approaching exhaustion? The Commissioner General of Immigration officially re-

ported, under date of September 23, 1921, that steamship companies could not be fined under the general provisions of the Act of 1917. He said:

> "The department has not endeavored to penalize steamship companies by levying administrative fines against them for bringing to ports of the United States aliens in excess of the quota limits of the act referred to; this for the reason that said act contains no provision authorizing it to do so, and there is no fine or penalty provided in the general immigration act (Act of Feb. 5, 1917) to which the Act of May 19, 1921, is an addition, which can possibly be construed as applicable. * * * The said Act makes no provision, however, for penalizing (either administratively or otherwise) steamship companies which bring aliens to the United States who are found to be ineligible for admission on other (and general) grounds. * * * There are now at some of our ports immigrant-laden vessels which, judging from present indications, will merely remain in port until the beginning of a new calendar month, when they will seek to discharge their alien passengers to the prejudice of aliens on other vessels, which have so timed their sailing as to arrive at, or shortly after the beginning of the month. * * * The department has no particular reason to believe that some (at least) of the steamship companies will not continue to bring them without particular regard to the question of whether or not they will be admitted. * * * The present disposition of the department is to charge the October quotas with these admissions (aliens admitted by the department under bond temporarily, though in excess of quotas), although there is the possibility that it will see fit to charge them against the quotas of some other month or months. * * * When the total amount of immigration permissible from some of these countries (coun-

tries with annual quotas ranging between 22 and 663) is divided into monthly allotments (as is necessary to do under the terms of the Act), it becomes apparent that even a moderate sized family would not be admitted all at one time—it would be necessary to return some of the members thereof, leaving them the option of remaining abroad or endeavoring again to reach a port of this country in a subsequent month before the quota for that month shall have become exhausted. * * * It would be of aid to the department in the matter of the enforcement of this law and would render more just and equitable its application to some of the smaller countries * * * if a change were made in its provisions which would permit of a larger immigration from these countries. * * * It is suggested that this minimum number be fixed at 1200."

Hearings for 1921 of House Committee on Immigration, pages 992-994.

Although there have been deportations under the Quota Law, on the ground that the quotas have been exceeded, they have been effected under a departmental regulation, not authorized by statute, reading:

"When the maximum number of aliens of any nationality who may be admitted in any period under this Act shall have been admitted all other aliens of such nationality, except as otherwise provided by said Act, who may apply for admission during that period shall be referred to a board of special inquiry for appropriate action."

By this administrative fiat the general provisions of the Act of 1917 have been attempted to be applied to excess quota cases. This, it is believed, is illegal.

Morvill vs. *Jones,* 106 U. S., 466;
The Parthian, 276 Fed. Rep., 903.

A critical examination of the Quota Law shows that it is not only devoid of a provision for deportation, couched even in the vaguest terms, but, with a single exception, that it uniformly speaks only of *"aliens who may be admitted."* That phrase is found at the beginning of Section 2 (a) and of Section 2 (d); and at the end of the first sentence of the latter section, by way of antithesis, there occur the words "shall be excluded."

It will naturally be borne in mind that although aliens of a particular nationality may sail from countless foreign ports to numerous American ports, in vessels flying various flags, the statute is silent as to how quota distribution shall take place as between the different ports. It has been impossible for any one to ascertain in advance whether on arrival at any of our ports the quotas for any particular country have been exceeded or not. Nor is it possible to foretell which of the various passengers arriving here on the same vessel or at the same time are to be deemed admissible, and at what instant of time the quota limits will have been reached. It has sometimes been a matter of seconds as to whether the passengers of one vessel are to be admitted and those of another to be declared non-admissible, although both arrived on the same day and the fortunate vessel may have sailed several days later than that whose passengers have been, so to speak, regarded as "excess baggage."

Section 3 of the Quota Law contains provisions which require the Commissioner General of Immigration to publish certain statistics relative to the number of aliens of the various nationalities who may be admitted to the United States, and monthly statements showing the number of aliens of the nationality already admitted during the then current

fiscal year and the number who may be admitted under the provisions of the Act during the remainder of the year, and when seventy-five per cent. of the maximum number of any nationality admissible during the fiscal year shall have been admitted such statements are to be issued weekly thereafter. The Secretary of Labor is required to submit these statements to the Secretary of State, "who shall transmit the information contained therein to the proper diplomatic and consular officers of the United States, which officials shall make the same available to persons intending to emigrate to the United States and to others who may apply."

In spite of the vagueness of this provision, it was clearly intended to make it possible for our Consuls abroad to prevent excess quotas and thereby to avoid hardship to the intending immigrants by limiting the number of visas affixed to passports presented to them.

The Court will take judicial notice that from the time when we entered into the European war no aliens could come to this country except with passports visaed by our consular officers abroad. This was accomplished by the terms of Section 1 of the Passport Act of May 22, 1918. That law was made a part of our permanent legislation by the Act of March 2, 1921 (41 St. L., 1217).

The Permanent Passport Law had been favorably reported by the House Foreign Affairs Committee on January 31, 1921, about two weeks before the Quota Law was reported in the Senate. This report emphasized the desirability of preventing deportations here by the sifting of immigration abroad (Cong. Record, Vol. 60, page 2401; House

Report No. 1280 of the 66th Cong., 3rd Session). To ensure its passage, the Senate Committee made the proposed law a rider to the "Diplomatic and Consular Appropriation Bill," reported on February 10, 1921. It passed the Senate on February 18, 1921; was accepted by the Conference Committee and duly approved by President Wilson March 2, 1921, becoming Public Act No. 357 (Cong. Record, Vol. 60, pages 2892, 3373, 3374-18, 3801, 3909 and 14, 3859, 3896, 3841).

When the Quota Act was under consideration, Senator Colt, Chairman of the Senate Committee on Immigration, alone discussed the method of winnowing out the inadmissibles under this measure. On February 19, 1921, when it was not yet certain that the Passport Law would become permanent legislation, he said (Cong. Record, Id. page 3455):

> "*Selection must largely be at the source.* It may be a matter of diplomatic regulation, through the consuls and the immigration commissioners of foreign countries * * *. *Of course, we could say we might do it under the visa system.*"

After the bill passed the Senate, it was acted upon by a Conference Committee which reported (Cong. Record, page 3965):

> "Provisions of treaties, conventions and agreements with various countries are not disturbed by the bill as amended."

In the House, Mr. Johnson, Chairman of the House Committee on Immigration, in charge of the bill and a member of the Conference Committee, in the course of the debate said (Id. page 3966):

> *"The in free provision under certain conditions is necessary to prevent possible individual hardships,* and answers criticisms on that score. *It is not planned to shut out by ones and twos those who have arrived at our gates, and who pass all the other immigration requirements. Gentlemen will notice the clause which provides that not over twenty per cent. admitted in a year may come in a month. It is that to which I have just been referring."*

After President Wilson's pocket veto of the Quota Law, when first passed, practically the identical bill was re-introduced and passed on May 19, 1921, at the special session of Congress. Meantime, as we have shown, the Passport Act had been made permanent, and the House Committee report (No. 4 of the 67th Cong., 1st Session, dated April 19, 1921, page 8), points out that it was then incidentally recognized that the quotas were to be regulated through our consuls abroad. It was there stated:

> "Provisions of treaties, conventions and agreements with various countries are not disturbed by the bill. Should any country which has made an agreement with respect to the limiting of immigration *elect to act under the provisions of this bill, and give passports to its nationals to the number of three per cent. of its people in the United States on the census of* 1910, *that step would itself end the agreement."*

During the debate in the House, Chairman Johnson, who was in charge of the measure, on April 20, 1921 (Cong. Record, Vol. 61, page 500) answered an inquiry as follows:

> "Mr. Sinnott: *'In case more than three per cent. applied to come to our country from some*

foreign country, in case, say five per cent. apply, who makes the selection of the three per cent.?'

Mr. Johnson of Washington: *'Incoming aliens come with passports. They must have passports from their Governments and vises of those passports by our consular agents. Should there be a surplus from any country undertaking to seek passport vises, the consular agent at that particular place would have, on the information here of the number which can be received, to refuse further vises.'*

Mr. Sinnott: *'Would the consular agent calculate on the three per cent. from the foreign country?'*

Mr. Johnson of Washington: *'No. His power to vise would not go beyond the number that might be permitted to proceed to the States."*

Resort to these statements made by those in charge of the bill, on its passage, in the course of the debates, which is permissible (*Duplex Co.* vs. *Deering*, 254 U. S., 443, 474, 475), makes it absolutely clear that Congress had no idea that deportations for mere excess of annual or monthly quotas were to take place from our shores from among holders of visaed passports. That was attempted to be accomplished solely by the departmental regulations, which were not authorized by the statute. It is, moreover, significant, that the construction contended for, to make consular action conclusive as to quota limits, is precisely in line with new bills to extend this Quota Act, through "consular certificates" provided for, as reported by the House Committee on Immigration on February 15, 1923 (House Report No. 1621, of 67th Cong., 4th Session, page 15) and February 9, 1924 (House Report No. 176 of 68th Cong., 1st Session, page 5).

An authoritative and important decision under the Chinese Exclusion Laws, gave relief under somewhat similar circumstances, even where the beneficiaries were not the innocent and hapless victims of others, as is the case here.

As is well known, nearly all the Chinese in the United States in 1892, refused to register under Section 6 of the Geary Act of that year, having been advised by distinguished counsel that the Act was unconstitutional. In consequence, more than 90% of the 100,000 Chinese in the United States were subject to deportation when that anomalous law was sustained by a divided court in the *Fong Yue Ting* case (149 U. S., 698) on May 15, 1893, shortly after the time to register had expired. Although they had been recalcitrant, and not merely as the respondents here, the unfortunate victims of an untoward fate, they had been misled. President Cleveland thereupon urged Congress to afford further time for registration (9 Richardson's Messages of the Presidents, 436), and Congress adopted his suggestion on November 3, 1893. Meantime, however, deportations would have taken place between May and November, but Judge Lacombe in the U. S. Circuit Court for the Southern District of New York, held in *habeas* proceedings that the statute which contained the provision, "ordered that he (the unregistered person), be deported from the United States as hereinbefore provided," was too indefinite to authorize deportation.

In re Ng Look, 56 Fed. Rep., 81.

In an earlier provision of the Geary Act, Section 2 (copied in 149 U. S., 670 at 691), Congress had provided that persons convicted or adjudged to be

not lawfully entitled to be or remain in the United States "shall be removed from the United States to China, unless he or they shall make it appear * * * that he or they are subjects or citizens of some other country, in which case he or they shall be removed from the United States to such country," with a further proviso that deportation should be to China, if such other country demands a head tax as a condition of entry of Chinese into it. Section 4 (id. page 700) also provided for sentence of hard labor for not over a year, and removal thereafter from the United States as hereinbefore provided."

On deciding in May, 1893, that the Geary Law provision for deportation was too indefinite to be enforced Judge Lacombe said:

> "The sixth section says that it shall be the duty of the judge 'to order his deportation from the United States as hereinbefore provided.' Examination of the prior sections of the act, however, discloses no provisions for such deportation. The most that I can do, therefore, is to order his deportation whenever provision shall be made for the same by the proper authority—presumably, by Congress—though some other act, to which my attention has not been called, may contain sufficient provision for this, in which case no further legislation would be needed. I find no provision authorizing the United States Judge, in such cases, to order the person found without certificate *to be imprisoned for an indefinite time, while awaiting deportation*, and therefore shall discharge him from immediate custody. This order will presumably be sufficient warrant for his future removal, when some proper officer appears, charged with the duty, and clothed with the authority, so to remove him."

Attorney General Olney acquiesced in Judge Lacombe's opinion, and no deportations took place except of persons who subsequently did not comply with the Amendatory Act of November 3, 1893, which conferred six months more time for registration. (See also Coolidge's Chinese Immigration, page 224 *et seq.*, for a detailed account of this incident.)

In an important decision concerning "alleged stowaways," which was accepted by the Immigration authorities, *U. S. ex rel. D'Amato* vs. *Williams*, 193 F., 228, *it was held that Congress did not intend deportation of innocent persons, coming over here in good faith, without knowing that some provision of the Act was being unconsciously violated.* Judge Learned Hand said:

> "The special provision laid down for the enforcement of manifests, which contain no provision for deportation, seems to me to indicate that Congress meant to limit the first words of Sec. 19 to the excluded classes mentioned in Sec. 2. * * * *I am not inclined to visit the sins of the ship's master upon the aliens, provided they are not in privity with him.*"

See also

> *Tsoi Sun* vs. *United States*, 116 Fed. Rep., 920.

The language of Mr. Justice Holmes in *Gegiow* vs. *Uhl*, 239 U. S., 9, 10, is very much in point:

> "The statute by enumerating the conditions upon which the allowance to land may be denied, prohibits the denial in other cases. And when the record shows that a commissioner of immigration is exceeding his power, the alien

may demand his release upon *habeas corpus.* The conclusiveness of the decisions of immigration officers under Sec. 25 is conclusiveness upon matters of fact. This was implied in *Nishimura Ekiu* vs. *United States,* 142 U. S., 651, relied on by the Government. As was said in *Gonzales* vs. *Williams,* 192 U. S., 1, 15, 'as Gonzales did not come within the act of 1891, the Commissioner had no jurisdiction to detain and deport her by deciding the mere question of law to the contrary.' Such a case stands no better than a decision without a fair hearing, which has been held to be had. *Chin Yow* vs. *United States,* 208 U. S., 8. See further, *Zakonaite* vs. *Wolf,* 226 U. S., 272; *Lewis* vs. *Frick,* 233 U. S., 291, 297 * * *."

"In the Act of February 20, 1907, Chap. 1134, § 2; 34 Stat., 898; as amended by the Act of March 26, 1910, Chap. 128, § 1; 36 Stat., 263, determining who shall be excluded, 'Persons likely to become a public charge' are mentioned between paupers and professional beggars, and along with idiots, persons dangerously diseased, persons certified by the examining surgeon to have a mental or physical defect of a nature to affect their ability to earn a living, convicted felons, prostitutes and so forth. The persons enumerated in short are to be excluded on the ground of *permanent personal objections accompanying them,* irrespective of local conditions, unless the one phrase before us is directed to different considerations than any other of those with which it is associated."

See also

32 *Opinions Attorney General,* 209.

The facts bearing on the proposition discussed under this Point were presented by the record, as to which an issue was presented by the traverse

to the return (*Rec.*, fols. 15, 38, 41). At all events, respondents may sustain the adjudication in their favor upon any ground supported by the law.

III.

For these reasons and those urged in our main brief, it is respectfully submitted that the judgment appealed from should be affirmed.

LOUIS MARSHALL,
JOSEPH G. M. BROWNE,
BARNET E. KOPELMAN,
MAX J. KOHLER,
Respondents' Counsel.